

Testimony of Gary S. Fergus
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Transportation Subcommittee on Consumer Affairs,
Foreign Commerce and Tourism
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My name is Gary Fergus. For approximately 21 years, I was a trial lawyer at the firm of Brobeck Phleger & Harrison, LLP. My client Enron, has instructed me that it is waiving the attorney-client privilege with respect to my testimony before this Subcommittee.

Brobeck Phleger & Harrison, LLP was retained in late September 2000 to represent Enron in connection with threatened litigation in California arising out of the high energy prices in the wholesale electricity market during the summer of 2000. Enron used a concept that they called the "virtual law firm" to assemble a team of lawyers from different firms each with our own area of expertise. Brobeck was selected because of our jury trial experience in complex matters. Brobeck was not and is not an energy regulatory firm.

By late November 2000, Enron had assembled a defense team that was headed by Mr. Robin Gibbs of the Gibbs & Bruns, LLP law firm in Houston, Texas. Mr. Michael Kirby of Post Kirby Noonan & Sweat, LLP was added to the team as another

experienced jury trial lawyer with extensive anti-trust experience and familiarity with the San Diego County California courts where a number of complaints had been filed.

In addition, Enron had a number of other firms that regularly advised the company in areas of their expertise. These included Stoel Rives, LLP located in Portland, Oregon and Bracewell & Patterson, LLP. Stoel Rives had energy regulatory experience and routinely advised Enron with respect to such issues. At the time, Stoel Rives had seconded Mr. Stephen Hall to Enron to be available on premises in Portland to provide additional resources to Mr. Christian Yoder and to be available on the trading floor to respond to questions from traders.

Brobeck was invited by Enron to attend a large two day orientation session in Portland, Oregon in early October along with a number of other firms including Bracewell & Patterson. At this orientation session there was a presentation from the head trader giving an overview of the electricity market conditions that prevailed during the summer of 2000.

In early November 2000, I spent an additional two days in Portland, beginning to learn the details of how the markets operated during the summer of 2000 and beginning to interview individual traders as to how they did their jobs. Mr. Richard

Sanders and Mr. Stephen Hall participated in some but not all of these meetings.

My understanding is that between the meetings in early November and the beginning of December 2000, Mr. Stephen Hall continued to meet with traders and gather more information. As a result of his interviews, he prepared the December 6, 2000 memorandum which is also dated December 8, 2000.

On December 11-12, a meeting was held in Portland, Oregon to further investigate the trading practices described in the December 8, 2000 memorandum. The meeting was chaired by Mr. Robin Gibbs and Mr. Richard Sanders. I, along with Mr. Michael Kirby and Mr. Stephen Hall participated. At that time, the decision was made to suspend any of the trading strategies still in use that were described in the December 8, 2000 memorandum.

At the same time, the wholesale electricity market was undergoing extreme volatility. The Federal Energy Regulatory Commission had issued its November 1, 2000 order and it was known generally that the Commission was about to issue another order on December 15, 2000. There were also concerns about the credit risk of market participants. Because all of these events were consuming the attention of Enron traders, a decision was made to set up a meeting as early as possible in January to

further investigate the trading practices that had been used during the summer of 2000.

In early January, there was another meeting in Portland, Oregon at Enron where the trading strategies described in the December 8, 2000 memorandum were discussed by the defense legal team and the head trader in Portland. At that time, Mr. Richard Sanders reiterated that none of the trading strategies described in the December 8, 2000 memorandum were to be used by Enron.

The lawyers responsible for defending Enron in the litigation pending in California were assigned the task of investigating the facts and evidence surrounding the events from the summer of 2000. Individual traders were interviewed by a team of defense lawyers from Brobeck, Phleger & Harrison LLP, Gibbs & Bruns, LLP and Post, Kirby Noonan & Sweat, LLP. to learn what information the traders had about the events that transpired during the summer of 2000. At the end of these meetings, all of the defense lawyers who had been interviewing witnesses jointly prepared the first draft of a memorandum summarizing what we had learned. This memorandum was circulated only to outside counsel and to Richard Sanders. There were several revisions that were exchanged among the lawyers in next few days while our interviews were still fresh in our minds. This memorandum

was a work in progress. The next step in the process was to check back with the head trader in Portland to make certain that the lawyers had understood the facts correctly. Other events, however, such as litigation with the California Power Exchange and its subsequent bankruptcy, motion practice in the California cases and retention of experts, overtook the defense team.

It was not until April 2001 that the defense team was able to turn back to the draft memorandum. At that time, during discussions with the head trader, I learned that the lawyers still did not have all the facts correct about what had happened during the summer of 2000. I also asked to see some documentary evidence that was relevant to some of the strategies that had been used during the summer of 2000. What I found were documents that were in conflict with some of the descriptions we had been given.

The draft memorandum was never completed because we had not resolved the factual conflicts. Other events in the litigation took precedence over the factual investigation of what happened during the summer of 2000. On December 2, 2001, Enron filed for bankruptcy and all defense efforts ceased.